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88-402

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

THE STATE OF MICHIGAN
Petitioner

v.

EDWIN MEESE, Attorney General
for the United States
Respondent,

and

STEVE ASMAR and
METRO INSTITUTIONAL FOOD SERVICES, INC
Intervening respondents.

PETITIONER FOR A WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

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STATEMENT OF THE QUESTIONS PRESENTED

I

IS 18 USC 2515, PROHIBITING A STATE COURT FROM ADMITTING INTO EVIDENCE AT A STATE PROCEEDING MATERIAL PROCURED BY A PRIVATE INDIVIDUAL IN VIOLATION OF TITLE III, EVEN ABSENT ANY PARTICIPATION BY THE GOVERNMENT IN THE ILLEGAL ACQUISITION, AN UNCONSTITUTIONAL INTERFERENCE WITH RIGHTS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT?

II.

IS THERE AN ARTICLE III CASE OR CONTROVERSY PRESENTED IN THIS DECLARATORY JUDGMENT ACTION WHERE THERE IS A DEFINITE AND CONCRETE DISPUTE WHICH IS NOT HYPOTHETICAL OR ABSTRACT, BETWEEN PARTIES HAVING ADVERSE LEGAL INTERESTS, AND IT IS DEMONSTRATED THAT PETITIONER HAS BEEN INJURED "AS A RESULT OF THE (CHALLENGED) STATUTE'S OPERATION"? (AND DID THE SIXTH CIRCUIT ERR BY REDUCING THE "CASE OR CONTROVERSY" QUESTION TO A FORMULA, CONTRARY TO THIS COURT'S STATEMENT IN BABBIT V UNITED FARM WORKERS, 442 US 289, 60 L Ed 2d 895, 99 S Ct 2301 (1979) THAT THE QUESTION IS ONE OF DEGREE AND IS NOT DISCERNIBLE BY ANY PRECISE TEST?)

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NOW COMES the State of Michigan, by

Frank J. Kelley, Attorney General, John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and prays that a writ of certiorari issue to review the judgment of the Sixth Circuit Court of Appeals entered in the above cause on July 6, 1988.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Michigan is appended as Appendix A. The opinion of the Sixth Circuit Court of Appeals is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the District Court for the Eastern District of Michigan was entered on August 10, 1987. The judgment of the Sixth Circuit Court of Appeals was entered on July 6, 1988. The jurisdiction of this Court is invoked under 28 USC 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 8, provides, in pertinent part, that among the powers of the Congress is the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," as well as the concommitant power "to make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers...."

The Tenth Amendment provides, in pertinent part: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISION INVOLVED

18 USC 2515 provides that

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter (emphasis added).

STATEMENT OF THE CASE

This case was decided on cross-motions for summary judgment in the district court. Its factual background was well stated by the opinion of the district court:

"The complaint mainly addresses legal questions, not facts. Its statement of the facts of the underlying "controversy" is limited to the following:

> Plaintiff is in receipt of a recording of telephone conversations containing evidence of public corruption. The recording was delivered anonymously, and recorded by a person or persons unknown. 18 USC 2511 and 2515 are preventing investigation of these apparent acts of public corruption.

The "recording" is an audio cassette tape recording that has been the subject of

considerable dispute in civil matters on the Court's docket. Jo-Dan, Ltd., Inc. v. Detroit Board of Education, No. 86-CV-72565-DT; A & M Corp. v. Landmark Shoppe, Inc., No. 86-CV-72738-DT; Asmar v. Detroit News, Inc., No. 86-CV-73390.

Plaintiff did not allege that a prosecution is advancing in which a state prosecutor will attempt to introduce as evidence the recording or evidence derived therefore. The complaint did allege that the United States Supreme Court had previously declined to assert original jurisdiction over the matter.

Concerned that the case was not "ripe" for judicial consideration, the Court issued an Order to Show Cause on March 13, 1987, giving both parties an opportunity to comment on whether a "case or controversy" exists, as required by Art. III, Sec. 2, cl. 1 of the

Constitution. The Order noted that plaintiff appeared to be seeking "an advisory decree upon a hypothetical state of facts." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 325 (1936), cited in Advisory Committee Notes to Rule 57, supra. The Order also noted that a federal court will not declare on the constitutionality of aspects of an investigation in progress. See Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1100-03 (D.C. Cir. 1985). Finally, the Order stated that it does not appear that "all parties having an interest (in the declaration sought) or adversely affected (have been) made parties or be(en) cited." Advisory Notes, supra.

Plaintiff's response to the Order to Show Cause revealed that the Wayne County Citizens Grand Jury issued subpoenas in

an investigation related to matters disclosed on the tape recording of various telephone conversations, including officials of the Detroit Board of Education, intercepted in probable violation of 18 U.S.C. Sec. 2515. Following a motion in Wayne County Circuit Court to quash the subpoenas based on the Act, a Wayne County circuit judge supervising the grand jury quashed the subpoenas on June 18, 1986, citing the Act as the basis for his decision. Plaintiff filed the state court order quashing the subpoenas and a transcript of the extensive hearing on the motion. Plaintiff argued that the state judge's action created a "case or controversy" because it deprived the State of the only means of investigating the matters discussed in the conversations on the tape.

Defendant filed a response to the Order to Show Cause on April 13, 1987. Defendant, who is joined in the case because he is "charged with the responsibility of enforcing the laws of the United States," agreed with plaintiff that the matter is ripe for judicial consideration. Defendant asserted that purely legal questions are involved and unlikely to be clarified by further factual development. See Thomas v. Union Carbide Agricultural Productions Co,. 473 U.S. 568, 581 (1985); Babbitt v. United Farm Workers National Union, 442 U.S. 189, 300-01 (1979).

For the reasons stated on the record of the hearing on May 4, 1987, the Order to Show Cause was dismissed by Order of May 5. On May 22, the intervening defendants - one of whom admits involvement in the intercepted

conversations - moved to intervene either as of right, Fed. R. Civ. p. 24(a)(2), or by permission, Fed. R. Civ. P. 24(b)(2). The motion was granted on June 2.

Now before the Court are cross-motions for summary judgment. Fed. R. Civ. P. 56. There are no disputes over facts, as the case presents a purely legal question. The parties have ably briefed the issue, and the Court has conducted its own analysis beyond the scope of the briefs.

For the reasons that follow, defendant's motion is GRANTED and the case is DISMISSED."

On appeal, the Attorney General shifted his position and argued that no case or controversy was presented. The Sixth Circuit agreed, finding that "the plaintiff, in the instant case, must show

that 1)it has suffered actual or threatened injury, which it clearly has through the quashing of the subpoenas, and 2)the injury was the result of an act of the defendant....It is the second element which the plaintiff fails to satisfy....Plaintiff's injury did not result from any action taken by the defendant, the Attorney General of the United States." The court did not discuss the effect on its analysis, if any, of the fact that the Attorney General was not the sole defendant, a participant to the conversation in question having been permitted to intervene.

REASONS FOR GRANTING THE WRIT

I.

Delegated Powers and the Tenth Amendment

It is a settled principle that our federal government is one of delegated powers. As to Congress, Article I, section 8 enumerates the powers of the Congress, including, as the only power relevant here, the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," as well as the concommitant power "to make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers...." That the authority of Congress is limited to that expressed in Article I, Section 8 (again, including the authority to make

laws "necessary and proper" to the execution of the powers specifically enumerated) is made clear by the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (emphasis supplied).

Certainly it is undeniable that this nation was designed with a strong central government, whose reach has extended as history has unfolded. But this does not mean that federalism has no place. Though the problems engendered by a weak central government under the Articles of Confederation were sought to be remedied by the framers of the Constitution, see The Federalist No. 15, No. 22, Anti-Federalists versus Federalists, (J. Lewis, ed., 1967), the Federalists,

countering anti-Federalist claims that the States were unduly diminished by the Constitution, were careful to point out that even the act of establishing the Constitution was to be a federal act, as it would "result neither from the decision of a majority of the people of the Union, nor from that of a majority of the States. It must result from the unanimous assent of the several States that are parties to it..."(emphasis in original). The Federalist, No. 39, Anti-Federalists versus Federalists, p. 312. Madison also emphasized in the same Federalist paper that in the extent of its powers the proposed central government was clearly federal rather than national, "since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over

all other objects" (emphasis supplied). Anti-Federalists versus Federalists, p. 314. Further, in rebutting claims that the advantage under the proposed Constitution was heavily with the central government, Madison observed that he was "persuaded that the balance is much more likely to be disturbed by the preponderancy" of the States.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the States' governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State. The Federalist, No. 45, Anti-Federalists versus Federalists, p.319-320.

The result of the debate concerning the power of the central government was, at least in part, the Tenth Amendment, conceded ultimately by the Federalists as necessary to secure ratification of the Constitution. Schwartz, The Bill of Rights: A Documentary History, p. 505 (1971).

This brief history is familiar, and these principles not controversial--the federal government is one of delegated and enumerated powers, the States retain those elements of sovereignty not surrendered to the Federal government in the Constitution, and the Tenth Amendment specifically so assures. But what role does the judiciary play in all this, if any? Of what relevance are Garcia v San Antonio Metro, 83 L Ed 2d 1016 (1985) and South Carolina v Baker, 56 L W 4311 (1988) to the inquiry?

The Tenth Amendment and Judicial Review

The majority opinion in San Antonio Metro proposes no test by which to assess all claims of an exercise of Congressional authority in excess of Article I, Section 8, and thereby also in violation of the Tenth Amendment. The Court simply found that in that case, involving federal wage and hour regulations of employees of a municipally operated transportation system, the structure of the Federal Government itself provided adequate protection to the States by their involvement in the political process through the representatives elected from among their citizens. But did the Court mean that the political process is always sufficient for the protection of the States? As pointed out by Justice Powell

in dissent, the Tenth Amendment is, after all, a part of the Bill of Rights, and one would not expect the Court to defer to the constitutionality of a statute challenged under the Fourth Amendment on the ground that the individual was adequately protected by the political process which enacted the statute, so that the courts have no role in protecting the individual's constitutional right.

A rule that the judiciary never has a role in assessing claims under the Tenth Amendment, that Congress is always its own arbiter as to whether its legislation is consistent with a portion of the Bill of Rights, is inconsistent with all other principles of judicial review. The principle of judicial review of the constitutionality of the acts of Congress

was not, after all, created by Chief Justice Marshall in Marbury v Madison, 1 Cranch 137 (1803), but is to be found in the Constitution itself. See Raoul Berger, Congress versus the Supreme Court, (1969). Further, history also supports the power of judicial review. Hamilton, in The Federalist No. 78, speaking to the power of the proposed federal courts, spoke specifically of judicial review:

> There is no position which depends on clearer principles, than that every act of delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal...that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.
>
> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive

> upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution....It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning.... Anti-Federalists versus Federalists, p.391.

Perhaps the best gauge of the meaning of the Constitution is the record of the State Conventions which ratified the Constitution; that was the view of Madison and Jefferson. See Berger, at 126. Those records demonstrate that the States viewed the judiciary as a check on the power of the central government. Oliver Ellsworth, one of the Framers, stated in Connecticut that "If the

general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges...will declare it to be void." Berger, at 130. John Marshall, later the author of Marbury v Madison, spoke to the judicial authority at the Virginia Convention, one of the most hotly contested, particularly given the fervent opposition to the Constitution of Patrick Henry, and proclaimed "Has the government of the United States power to make laws on every subject?....Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard.

They would not consider such a law as coming under their jurisdiction. They would declare it void...." Page Smith, The Constitution, p. 256 (New York, 1980). George Nicholas, referring to fears regarding the "sweeping (necessary and proper) clause" declared "who is to determine the extent of such powers? I say, the same power which, in all well-regulated communities, determines the extent of the legislative powers. If they exceed those powers, the judges will declare it void, or else the people will have a right to declare it void." Berger, at 146. Samuel Adams, referring to a proposal that "powers not expressly delegated to Congress are reserved to the several states," stated in Massachusetts that this proposal would remove "a doubt which many have entertained respecting the matter, and gives assurance that, if

any laws made by the Federal Government shall be extended beyond the powers granted by the proposed Constitution...it will be...adjudged by the Courts of law to be void" (emphasis supplied). Berger at 131. Examples exist also from the other states.

The history surrounding the Bill of Rights reveals also that protection against the central government, against a feared "legislative despotism," was the principal motive. Both the rights of individuals and of the States were the concerns of those who insisted upon a Bill of Rights. Madison stated to the First Congress in offering the Amendments that the "guard against abuse" "must be leveled against the legislative, for it is the most powerful, most likely to be abused." 1 Ann. Cong. 454. In urging

their adoption he further stated that if the Amendments were "incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; **they will be an impenetrable bulwark against every assumption of power in the legislative or executive"** (emphasis supplied). 1 Ann. Cong. 456-457. To the extent permissible given San Antonio Metro, at least at this point in our Constitutional history, the courts should remain an "impenetrable bulwark against every assumption of power in the legislative" branch inconsistent with the Constitution, whether the inconsistency be with the First Amendment, the Tenth Amendment, or any other Constitutional provision. As stated by Madison in The Federalist No. 44, speaking to the question of the remedy if Congress should

exercise powers pursuant to Article I, Section 8 not warranted by the "true meaning" of the "necessary and proper clause," "I answer the same, in short, as if the State legislature should violate their respective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers" (emphasis supplied). The Federalist, p. 295, (New York, 1937). The courts, then, at least with the claim raised in this case, should determine in the first instance whether the Congress has exceeded its rightful authority. As put by Professor Bickel, summarizing

Chief Justice Marshall's views in Marbury, "to leave the decision with the legislature, he said, is to allow those whose power is supposed to be limited themselves to set the limits--an absurd invitation to consistent abuse." Bickel, The Least Dangerous Branch, The Supreme Court at the Bar of Politics, (Bobbs-Merrill, 1962), p.3. It would mean that the Tenth Amendment has been rewritten to say "Such power as Congress elects not to exert may to that extent leave something for state and local governments to do." Van Alstyne, 83 Mich L Rev at 1724, fn 64.

Economic Regulation, Police Regulation, and the Survival of National League of Cities

The test for measuring exercises of the commerce power against the Tenth Amendment developed in National League of Cities, 426 US 833, 49 L Ed 2d 245, 96 S

Ct 2465 (1976), at least as to economic regulations, was

> First, there must be a showing that the challenged statute regulates the "States as States'....Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty'....And third, it must be apparent that the states' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.'

Hodel v Virginia surface Mining, 452 US 264,276-277, 69 L Ed 2d 1, 101 S Ct 2352 (1981), quoting National League of Cities. In Texas v United States,, 730 F 2d 339 (CA 5, 1984) the court observed that "in many articles of the Constitution the necessary existence of the States and, within their proper spheres, the independent authority of the States, is distinctly recognized." 730 F 2d at 356, quoting Lane County v Oregon, 74 US 71, 76, 19 L Ed 101 (1869). The court stated that commerce power

legislation that treats states in a manner inconsistent with the Tenth Amendment runs afoul of the constitutional assumption of federalism "because such acts force the states to administer congressional policy judgments. In effect such acts convert state agencies into tools of federal policy, and thereby threaten the independence of the states. The suspect characteristic of such acts, then, is that the states are compelled to carry out federal policy." 730 F 2d at 356. Congressional legislation preempting state law regarding private activity would not run afoul of principles of federalism, for state sovereignty is not implicated simply because the states cannot prevent the carrying out of federal policy, but is implicated if the states are forced to carry out federal policy. 730 F 2d at 357, fn 32.

A) Title III As A Police Regulation

Though strong arguments may be made that regulation of states regarding wages and hours of state and municipal employees violates principles of federalism, as witness the unusually vociferous dissents of four justices in San Antonio Metro, a distinction may be drawn between the federal/state relationship in that case and the case presently before the court. 18 USC 2515 provides that

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter (emphasis added).

Under 18 USC 2511 the interception or disclosure of a wire or oral communication by a private person, who is not a party to the communication, is a federal criminal offense. Under section 2515, then, evidence obtained by a private party in violation of section 2511, with no participation of any sort by any state or federal officials in the illegality, is inadmissible in a state court, as is any evidence derived from that illegally acquired communication.

The Senate committee report to Title III indicates that Congress had a dual purpose in enacting the legislation: "1)protecting the privacy of wire and oral communications, and 2)delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be

authorized." S Rep No. 1097, 90th Cong, 2d Sess, 66 (1968). As to section 2515, the congressional findings state that

> In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce it is necessary for Congress...to prohibit any unauthorized interception...and the use of the contents thereof in evidence in courts and administrative proceedings. s. 801(b), 82 Stat 211

The Senate report observed that aside from the criminal penalties of the statute, and the civil penalties, "The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings." S Rep No. 1097, at 69. Of course, where, as in the instant case, evidentiary use is sought by the State in a criminal proceeding brought on behalf of the State, and the

accomplished by the State, the notion of denying the "perpetrator...the fruits of his unlawful actions" has no force whatever.

Petitioner would observe here that one state court has noted the potential Tenth Amendment difficulty with section 2515. The Indiana Supreme Court had before it a wiretapping question arising out of a divorce action in In re Marriage of Lopp, 378 N E 2d 414 (Ind., 1978), cert den, 439 US 116 (1979). The husband in the case had taped his wife's conversations on the telephone, and when a separation occurred, confronted her with the tapes, threatening that if she did not consent to give him temporary custody of their son he would reveal the contents of the tapes to her former husband, which could cause the loss of her custodial rights in

her children from that marriage. When the wife subsequently claimed her consent to certain court orders was obtained by fraud and coercion, the husband moved to admit the tapes, and the trial judge granted the request. The court held the admission of the tapes proper against a challenge under Title III. In reaching its conclusion the court observed that "questions of federalism are necessarily involved in any application of s. 2515 to marital actions. This is because both the clear language and legislative history of the statute arguably foreclose any exceptions to its rule, as a matter of statutory interpretation." The court went on to state that "to the extent s.2515 can be read to the contrary (of its holding that the tapes were admissible), it would be an unconstitutional impairment of an

integral and essential function of state court judges, the entering of efficacious orders, free of fraud, which function here is related to a service traditionally performed by state judges and expected of them by their legislatures and citizens, the providing for the best interest of the children in domestic relations disputes." 378 N E 2d at 423. Though the court avoided a direct holding that 2515 is unconstitutional by finding that "We seriously doubt...that the national Congress intended such an interpretation and application of s.2515," in truth the court was correct in its observation that by its language the statute forecloses such an exception as the one it accepted. The only appropriate holding to support the admission of the tapes was that the statute was unconstitutional as applied

to the circumstance before the court. See contra, Halpin v Superior Court, 495 P 2d 1295, cert den 409 US 982 (1972).

Title III, based on the commerce clause, is a police regulation--it seeks to assure the privacy of wire and oral communications, and to assure that government interests in crime fighting are accommodated by a procedure for judicial authorization. To insure compliance with the police regulation, criminal penalties and civil penalties were created, as well as a rule of evidentiary exclusion, in order to deny the perpetrator of any unlawful wiretapping "the fruits of his unlawful actions in civil and criminal proceedings" (in criminal proceedings in the event that the perpetrator was a government agent). The regulations

involved in San Antonio Metro, on the other hand, are not police regulations at all, but may more appropriately be termed economic regulations.

Federal "police" regulation through use of the commerce clause has been, from the beginning, aimed at objectives far removed from the economic concerns that prompted the commerce clause, and, at the beginning, was directed to prohibiting certain kinds of interstate movements. See e.g. Champion v Ames ("The Lottery Case"), 188 US 321, 23 S Ct 321, 47 L Ed 492 (1903). As to this Congressional use of the commerce clause to justify police rather than economic regulation, Professor Gunther has stated that "Expansion of federal criminal jurisdiction raises some of the most sensitive problems of potential

impingement upon the values of federalism....the risks persist in the mounting modern resort to the commerce power as the basis for new federal criminal laws, relying both on the 'commerce-prohibiting' and 'affecting commerce' techniques." Gunther, Constitutional Law, p. 194-195 (9th ed.,1978).

The point here is not to challenge the ability of Congress under the commerce clause to enact the police regulations of Title III regarding wiretapping; clearly, that use of the commerce power is appropriate. But that the end is appropriate, does not mean that all means to that end are appropriate or legitimate. See NLRB v Jones and Laughlin Steel, 301 US 1, 81 L Ed 893, 57 S Ct 615 (1937), Garcia v San Antonio

Metro (dissent of Justice O'Connor), 83 L Ed 2d at 1054. Petitioner submits that the means employed in s. 2515, when applied to prohibit state courts from admitting evidence obtained by the State with no violation of the law by state officials, is illegitimate, and that this court should so declare.

B) The Test of National League of Cities

Though petitioner recognizes that San Antonio Metro overruled National League of Cities, the Court did also recognize that there exist "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause," 83 L Ed 2d at 1937, though declining to attempt to sketch the contours of those limits. Where

Congressional action requires the exclusion of evidence in a state court proceeding (or its admission, as the chapter also declares that any conversations obtained consistent with the chapter shall be admissible in any state court, precluding a state from having more severe limitations in the area of consensual recording or monitoring!), attention to the limits on federal action imposed by the "constitutional structure" is imperative. Petitioner suggests that it is appropriate for this court to view San Antonio Metro as applicable only to the class of cases there before it, as the Court itself declared that it was "going no farther" than to say that "in the factual setting of these cases" the exercise of authority did not offend the Constitution. San Antonio Metro involved

the use of the commerce power as a method of economic regulation, applied to state employees. The instant case involves, on the other hand, use of the commerce power as a method of police regulation, and a means of enforcement which infringes as directly as can be on State sovereignty. Petitioner suggests, then, that this court should find the test of National League of Cities applicable to cases of exercise of congressional authority under the commerce clause to enact police regulations where the exercise of authority regulates the States and not simply private conduct.

Continuing to apply National League of Cities to police regulations is appropriate given the recognition that federal criminal regulation is "among the clearest examples of federal regulation

of 'traditionally local' concerns." Gunther, at 194. Particularly here, where the regulation challenged is more than a criminal regulation of private conduct, but a prohibition upon the state judiciary to receive evidence in the possession of state prosecuting officials where that evidence was not obtained by the State through any violation of the federal statute, are "traditionally local" concerns involved. Section 2515 does not make conduct criminal; rather, in enforcing the statutory prohibition the section forces the state courts to become partners in the execution of the federal policy. The section may (and has in this case) preclude a state from the enforcement of its own laws.

Petitioner thus submits that application of National League of Cities

is appropriate, and that an application of the test there described demonstrates the unconstitutionality of the statute. Clearly the section regulates the States as States, precluding, as it does, admission of illegally recorded evidence, or evidence derived therefrom, by a "State, or a political subdivision thereof...." Second, the federal regulation perhaps even more clearly addresses a matter that is "indisputably an attribute of state sovereignty." It is virtually tautological to state that the decision on the appropriateness of the receipt of particular evidence (assuming no question of the State having obtained it unconstitutionally), that the enforcement of State laws and the conduct of state judicial proceedings, is an attribute of state sovereignty. Finally, it is equally apparent that state

compliance with the federal law would impair the state ability to structure integral operations in areas of traditional functions. The traditional function is state judicial proceedings; the impairment is that the State is prohibited from making its own decision on the admissibility of evidence in proceedings before its courts, being forced instead to bow to the will of Congress. The Tenth Amendment protects the State from this sort of usurpation of authority. As well-put by Professor Tribe, "we surely can avoid insulting the states by ordering them about like so many federal bureaucratic lackeys when the federal constitutional rights of individuals are not at stake....It is one thing for the Constitution to dictate the way of the world to the states and quite another for Congress to do so. The

Commerce Clause, after all, empowers Congress to regulate commerce, not to regulate the states." Tribe, Constitutional Choices, p. 131, (Cambridge, 1985).

Lee v Florida

The District Court relied heavily on Lee v Florida, 392 US 378 (1968), and several other Supreme Court decisions which the district court stated demonstrated that the Court has "several times struck state judicial procedural rules in order to further a federal legislative goal or protect a federal statutory right." District Court opinion, p. 10, fn 6. That court misperceived those cases. As to Lee, Lee did hold that Section 605 of the Federal Communications Act of 1934, the

predecessor of both the current act and Title III, by its terms required exclusion of evidence offered in a state court where that evidence had been obtained in violation of the Act (by the government, in that case). But petitioner here concedes that by its language Section 2515 applies to the States; the question is whether Congress has the constitutional authority to do what it has done. Lee does not settle this question; indeed, it has nothing whatever to say regarding it.

It is clear that the question of Congress's authority and the application of the Tenth Amendment was neither raised nor decided in Lee. The State of Florida did not raise a Tenth Amendment claim, the argument being one of statutory interpretation only. The Court decides

that which is before it and no challenge to the authority of Congress was before it in Lee. No implicit "finding" can be found in Lee, and it is a fundamental principle of interpretation that a point assumed without consideration is not decided. See e.g. Allen v Duffie,, 43 Mich 1 (1880).

Clearly, Congress may choose to make it the policy of the federal government that in the class of illegality here at issue the evidence shall be inadmissible even absent government wrongdoing. But as to the States, that decision belongs to them. Whether their judicial integrity is violated in this situation, though not in other situations of illegal private conduct resulting in the offer of relevant evidence by the state, is not a decision for the Congress. Whether the

privacy of the individual is, in these cases, more important than the ascertainment of the truth, the vindication of public justice, more important than, say, the privacy of the home where that home is invaded by a private individual resulting in the offer of relevant evidence by the State (given that we admit that evidence), is a state decision.

II.

As indicated in the Statement of the Case, the Government agreed with Petitioner in the district court that the instant case presented a case or controversy under Article III. However, Defendant Meese changed his position in the Appellee's Brief, and argued in the brief that there is no case or controversy, a position accepted by the Sixth Circuit.

This is a declaratory judgment action regarding the constitutionality of portions of Title III, the "eavesdropping" chapter, most particularly section 2515 requiring a state court to exclude as evidence in a state cause of action conversations recorded in violation of federal law, and any derivative evidence, even if the State had no hand in the illegality. The Attorney General is the chief law enforcement officer of the United States, and disclosure of conversations recorded in violation of the statute is a federal criminal offense.

In South Carolina v Katzenbach, 383 US 301, 15 L Ed 2d 769, 86 S Ct 803 (1966) Congress had passed the Voting Rights Act of 1965, and South Carolina

filed an original action against the Attorney General of the United States in the United States Supreme Court. In upholding the Act the Court had no difficulty in finding a case or controversy, simply observing that South Carolina sought declaratory and injunctive relief against enforcement of the provisions by the Attorney General, who had enforcement power. 15 L Ed 2d at 774. The Attorney General, as in this case, had done absolutely nothing to South Carolina--he had not threatened prosecution, and he had done nothing to enforce the law, as at that time there had been no violation. But plainly the controversy existed and was real, and Petitioner submits that there is no principled distinction between Katzenbach and the instant case. If the "two prong" test of the Sixth Circuit is the

law--that petitioner show "1)it has suffered actual or threatened injury,... and 2)the injury was the result of an act of the defendant..."--then Katzenbach was wrongly decided, for the injury was no more the result of an act of the defendant in that case than this.

This Court itself has observed that "the difference between an abstract question and a 'case or controversy' for purposes of determining justiciability under Article III of the Federal Constitution is one of degree and is not discernible by any precise test." Babbitt v United Farm Workers, 442 US 289, 60 L Ed 2d 895, 99 S Ct 2301 (1979). Despite this language, however, the Sixth Circuit applied a "precise test" and found Petitioner wanting. But the basic inquiry is whether there is a definite

and concrete dispute which is not hypothetical or abstract, between parties having adverse legal interests. Babbitt, supra. As well put in Babbitt, "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement...."(emphasis added). 60 L Ed 2d at 906. In a Motion to Publish the Court of Appeals' opinion the Attorney General described that court's opinion as holding that "injury resulting from the operation of a federal statute does not give rise to the requisite adversity...." Petitioner agrees with this description of the holding, which is precisely contrary to this Court's statement in Babbit. "As a result of the statute's operation" in this case petitioner has been injured and continues to be injured.

Were Petitioner simply emotionally upset by a perceived intrusion upon state sovereignty caused by the existence of the statute, and wished, as an academic exercise, to establish that the federal Congress had no such power over the states, then there would be no Article III case or controversy. However, as has clearly been established, Petitioner possesses an illegally recorded tape which Petitioner wishes to introduce into evidence at state proceedings, and further wishes to use grand jury subpoenas to gain derivative evidence in investigating the public corruption revealed on the tapes. Section 2515 blocks such efforts, and presently for a state judge to allow otherwise would be to permit a federal criminal offense. This case is not a hypothetical case or an academic exercise. There are real and

significant consequences to the parties (which include Steve Asmer and Metro Institutional Foods, as well as Attorney General Meese) to this Court's decision regarding the tape. Clearly the Attorney General and Petitioner have adverse interests in the matter, just as did the State of South Carolina and Attorney General Katzenbach in South Carolina v Katzenbach. See also Thomas v Union Carbide, US , 105 S Ct 3325,3333 (1985) regarding the sufficiency of a showing that the impact of the challenged federal statute is real and concrete.

It should be observed that there is not only a case or controversy between the State of Michigan and Defendant Attorney General Meese, but between the State of Michigan and defendants Metro Institutional Foods and Steve Asmer, who

gained enforcement of section 2515 in state court, and without question are adverse to Petitioner in an actual controversy involving a question of federal law. An opinion on the merits in this case not only declares the rights between parties State of Michigan and Attorney General Meese as regards the recording and derivative evidence at issue and Title III, but between parties State of Michigan and Metro Institutional Foods and Steve Asmer as well.

The interests, then, of Petitioner and Defendant Attorney General Meese, and between Petitioner and Defendants Metro Institutional Foods and Steve Asmer, being adverse, regarding a concrete controversy and the application of federal law, Petitioner requests that this Court find that a case or

controversy exists, and address the merits of this matter. As indicated above, the holding of the Sixth Circuit conflicts with authority from this Court, and the Attorney General himself stated in the Motion to Publish the Sixth Circuit opinion (which was granted) that the opinion of that court was important, "and in a context where there is little case law." Because the Sixth Circuit has misapplied the law regarding a case or controversy to avoid the merits, certiorari should be granted on both questions.

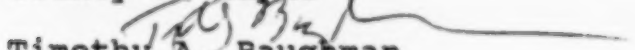
CONCLUSION

WHEREFORE, for the reasons above stated, Petitioner submits that plenary review should be granted, and the Sixth Circuit Court of Appeals and the District Court for the Eastern District of Michigan reversed.

Respectfully submitted,

Frank J. Kelley
Attorney General

John D. O'Hair
Prosecuting Attorney
County of Wayne



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APPENDIX A
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,

Plaintiff,

vs.

Civ. No. 87-CV-70865-DT

EDWIN MEESE, ATTORNEY GENERAL
FOR THE UNITED STATES,

Defendant,

and

STEVE ASMAR and METRO INSTITUTIONAL
FOOR SERVICES, INC.,

Intervening Defendants.

8/10/87

AMENDED OPINION AND ORDER

THIS IS AN ACTION FOR A DECLARATORY JUDGMENT. 28 U.S.C. Sec. 2201 Fed. R. Civ. P. 57. Plaintiff, the State of Michigan, seeks a declaration that Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 ("the Act"), 18

U.S.C. Sec. 2510-2520,[1] violates the Tenth Amendment of the United States

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1 The case focuses on section 2515, which provides in full: Whenever any wire or oral communication has been intercepted, not part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury ... of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2511 provides in pertinent part:

(1) Except as otherwise specifically provided in this chapter any person who -

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communcation;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communcation, knowing or

Constituion[2] as applied to the states. Section 2515 of Title 18 prohibits, inter alia, a state of political subdivision from introducing as evidence in any proceeding the contents, or fruits thereof, of a communication intercepted in violation of section 2511.

> having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both. Pub. L.90-352,Title III, Sec 802, June 19, 1968, 82 Stat. 216. The Electronic Communications Privacy Act of 1986, Pub. L. 99-508 (effective January 20, 1987), comprehensively revised Title III but preserved section 2515 without amendment.

2 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the Sates, are reserved to the States respectively, or to the people."

Plaintiff argues that the only conceivable justification for the Act is the Commerce Clause of the Constitution. Art. 1, Sec 8, cl. 3. Plantiff recognizes that the United States Supreme Court has affirmed the wide scope of the Commerce Clause even as applied to the states, but relies on language in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), that can be construed as having left open the possibility that the Tenth Amendment might impose some "affirmative limits ...on federal action affecting the States under the Commerce Clause." Id. at 556. Plaintiff contends that the Act exceeds such affirmative limits.

The complaint mainly addresses legal questions, not facts. Its statement of the facts of the underlying "controversy" is limited to the following:

> Plaintiff is in receipt of a recording of telephone conversations containing evidence of public corruption. The recording was delivered anonymously, and recorded by a person or persons unknown. 18 USC 2511 and 2515 are preventing investigation of these apparent acts of public corruption.

The "recording" is an audio cassette tape recording that has been the subject of considerable dispute in civil matters on the Court's docket. Jo-Dan, Ltd., Inc. v. Detroit Board of Education, No. 86-CV-72565-DT; A & M Corp. v. Landmark Shoppe, Inc., No. 86-CV-72738-DT; Asmar v. Detroit News, Inc., No. 86-CV-73390.

Plaintiff did not allege that a prosecution is advancing in which a state prosecutor will attempt to introduce as evidence the recording or evidence derived therefore. The complaint did allege that the United States Supreme

Court had previously declined to assert original jurisdiction over the matter.[3]

Concerned that the case was not "ripe" for judicial consideration, the Court issued an Order to Show Cause on March 13, 1987, giving both parties an opportunity to comment on whether a "case or controversy" exists, as required by Art. III, Sec 2, cl. 1 of the Constitution. The Order noted that plaintiff appeared to be seeking "an

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[3] Plaintiff apparently sought to invoke the Supreme Court's original, but not exclusive, jurisdiction over controversies between the United States and a State. See 28 U.S.C. Sec 1251(b)(2). The complaint states that the Supreme Court declined leave to plaintiff to file a bill of complaint in this matter and that the Solicitor General opposed plaintiff's application on the ground that the federal district is a more appropriate original forum. The Supreme Court's one sentence order expressed no opinion as to the appropriate forum in this matter. State of Michigan v. Meese, 107 S. Ct. 1274 (1987).

advisory decree upon a hypothetical state of facts." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 325 (1936), cited in Advisory Committee Notes to Rule 57, supra. The Order also noted that a federal court will not declare on the constitutionality of aspects of an investigation in progress. See Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1100-03 (D.C. Cir. 1985). Finally, the Order stated that it does not appear that "all parties having an interest (in the declaration sought) or adversely affected (have been) made parties or be(en) cited." Advisory Notes, supra.

Plaintiff's response to the Order to Show Cause revealed that the Wayne County Citizens Grand Jury issued subpoenas in an investigation related to matters disclosed on the tape recording of various telephone conversations, including officials of the Detroit

Board of Education, intercepted in probable violation of 18 U.S.C. Sec. 2515. Following a motion in Wayne County Circuit Court to quash the subpoenas based on the Act, a Wayne County circuit judge supervising the grand jury quashed the subpoenas on June 18, 1986, citing the Act as the basis for his decision. Plaintiff filed the state court order quashing the subpoenas and a transcript of the extensive hearing on the motion. Plaintiff argued that the state judge's action created a "case or controversy" because it deprived the State of the only means of investigating the matters discussed in the conversations on the tape.

Defendant filed a response to the Order to Show Cause on April 13, 1987. Defendant, who is joined in the case because he is "charged with the responsibility of enforcing the laws

of the United States,"[4] agreed with plaintiff that the matter is ripe for judicial consideration. Defendant asserted that purely legal questions are involved and unlikely to be clarified by further factual development. See Thomas v. Union Carbide Agricultural Productions Co., 473 U.S. 568, 581 (1985); Babbitt v. United Farm Workers National Union, 442 U.S. 289, 300-01 (1979).

For the reasons stated on the record of the hearing on May 4, 1987, the Order to Show Cause was dismissed by Order of May 5. On May 22, the intervening defendants - one of whom admits involvement in the intercepted conversations - moved to intervene either as of right, Fed. R. Civ. p. 24(a)(2), or by permission, Fed. R. Civ. P.24(b)(2). The motion was granted on June 2.

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[4] The Attorney General is a proper party to any action affecting the interests of the United States. See 28 U.S.C. Sections 516, 517, 2403(a); see also Fed. R. Civ. P. 24(c).

Now before the Court are cross-motions for summary judgment. Fed. R. Civ. P. 56. There are no disputes over facts, as the case presents a purely legal question. The parties have ably briefed the issue, and the Court has conducted its own analysis beyond the scope of the briefs.

For the reasons that follow, defendant's motion is GRANTED and the case DISMISSED.

II.

A.

This case clearly poses a question about the limits of the principle of federalism and its embodiment in the Bill of Rights, the Tenth Amendment. Much has been said of late about federalism and the role of the judiciary. Compare, e.g. The Status of Federalism in America

(Report of the Working Group on Federalism of the Domestic Policy Council, Nov., 1986) (bemoaning the failure of the Supreme Court to overrule more Congressional statutes), and Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985) (criticizing Garcia, supra), with J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980) (proposing that the Supreme Court rule such federalism issues to be nonjusticiable questions that must be left to the political branches).

At least two state courts have noted that section 2515 involves questions of federalism when applied to state court proceedings that are traditionally of state concern. Compare In re Marriage of Lopp, 378 N.E.2d 414, 421 (Ind. 1978)

refusing to apply section 2515 under circumstances of case), cert. denied, 439 U.S. 1116 (1979), with Halpin v. Superior Court of San Bernardino County, 495 P.2d 1295, 1305(Cal.)(rejecting Tenth Amendment challenge to section 2515), cert. denied, 409 U.S. 982 (1972). One constitutional scholar has noted that, in general, the "(e)xpansion of federal criminal jurisdiction raises some of the most sensitive problems of potential congressional impingement upon the values of federalism." G. Gunther, Constitutional Law Cases and Materials 194 (9th ed. 1978).

B.

However divergent may be the political, academic, and state court views regarding federalism, the Court is bound to look for guidance in the decisions of the Supreme Court of the United States. The issue is not decided

in a legal vacuum. The Supreme Court has considered the scope of the Tenth Amendment, even though its teachings on that subject may be in a state of flux. Briefly, however, this much can be said: there is not a single case that can be considered "good law" that purports to overrule a federal statute on the ground that it violates the Tenth Amendment.

In Usery v. National League of Cities, 426 U.S. 833 (1976), the Supreme Court struck down a federal minimum wage statute for state employees as violative of the Tenth Amendment. After Usery, however, the Supreme Court declined to invalidate a single federal law applicable to the state on the ground that it interferes with their autonomy under the Tenth Amendment. Now, even Usery is no longer the law. With the Supreme Court's decision in Garcia, supra, which overruled Usery, the Tenth

Amendment has become a dead letter in constitutional law.

Subsequant to Garcia, it is not clear what standard applies to issues like the one before the Court. Garcia seems to have discarded Usery's "balancing" test. See 469 U.S. at 564n.7 (Powell, J., dissenting). But see id. at 579-80 (Rehnquist, J., dissenting) (disagreeing that Usery announced a "balancing" test). However, Garcia fails to "identify or define what affirmative limits the consitutional structure might impose on federal action affecting the States under the Commerce Clause." Id. at 556. Indeed, the State of Michigan admits that "it is difficult to conceive a method of analysis for the question here at issue." While the State has attempted to fill this void with some imaginative legal and political analysis, it does not lead to the declaration it seeks.

C.

The Supreme Court is unlikely to accept the State's argument here, since the Supreme Court has applied the exclusionary rule - a judicial supervisory rule not required by the Constitution, see United States v. Leon, 468 U.S. 897, 905-06 (1984) - to the States, with the same result as here of suppressing evidence the State seeks to introduce in a prosecution. Under the exclusionary rule, states are bound to exclude evidence in some cases even where governmental agents obtained the evidence in subjective good faith (as, for example, where an officer's seizure of the evidence under a facially deficient warrant is not objectively reasonable). Leon, 468 U.S. at 922-23. The Supreme Court has already noted that, as the exclusionary rule was understood at the time, section 2515 proscribes such

evidence not only to deter misconduct by governmental agents but also to preserve the integrity of court proceedings, i.e. "to ensure that the courts do not become partners to illegal conduct." Gelbard v. U.S., 408 U.S. 41, 49-51 & n.8 (1972) (quoting the Congressional findings that precede Title III, Section 801 (b), 82 Stat. 211). Thus, the State's argument here that its agents did nothing reprehensible in obtaining the recording at issue is not relevant.

Another persuasive example against the State's position is the Supreme Court's requirement that state courts exclude confessions obtained in violation of the familiar Miranda warning (or an adequate state equivalent). Here, the Supreme Court has imposed on state criminal proceedings a judicially-designed rule of evidence not required by the Constitution. See Michigan v. Tucker,

417 U.S. 433, 444 (1974). The result is to exclude in some cases evidence voluntarily given and constitutionally obtained. See Michigan v. Mosely, 423 U.S. 96, 100 (1975); Tucker, supra, 417 U.S. at 443.

By enacting section 2515, Congress requires exclusion of illegally otained electronic recordings, which is a form of obtaining an incriminating statement without informed consent or proper safeguards against intrusion of privacy. The State does not say why, if it is legitimate for the Supreme Court to promote the integrity of the courts through rules of criminal procedure, Congress may not do the same. In Olmstead v. United States, 277 U.S. 438 (1927), the Supreme Court endorsed the power of Congress to make intercepted telephone conversations inadmissible whereas the court might lack such power under the Fourth Amendment (as understood

at that time). Id. at 465-66. Indeed, the legislative history of section 2515 indicates that Congress largely intended to reflect existing search and seizure law. See S. Rep. No. 1097, 90th Cong., 2d Sess. 66, 96, reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2185.

The State concedes that Congress may forbid private persons from intercepting conversations without authorization, but simply argues that the State may subsequently use evidence privately intercepted even if its own agents could not have legally made the initial seizure. While the Supreme Court has accepted this argument where Congress has not spoken, see United States v. Jacobsen, 466 U.S. 109 (1984), the Supreme Court has disallowed state use of such evidence where Congress has spoken, as in section 605 of the Communictions Act of 1934, the predecessor of section

2515. See Lee v. Florida, 392 U.S. 378 (1968).[5] The State correctly points out that the Supreme Court in Lee did not address the Tenth Amendment issue. Nonetheless, the Supreme Court's subsequent pronouncements on the Tenth Amendment and continued application of the exclusionary rule to state courts suggest it would not overrule Lee or the statutory basis for that decision.

In enacting section 2515, Congress noted: "Only by striking at all aspects of the problem can privacy be adequately protect." S. Rep. No. 1097, supra, at

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[5] The Court in Lee stated: "We conclude ... that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law" in the only effectively available way - by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960)." 392 U.S. at 386-87. The Court of Appeals for the First Circuit recently reached the same conclusion under the current section 2515. United States v. Vest, 813 F.2d 477 (1st Cir. 1987).

69 (quoted in Gelbard, supra, 408 at 50), reprinted in 1968 U.S. Code Cong. & Admin. News 2156. In making this statement, Congress indicated that it considers judicial exclusion of improperly obtained communications "necessary and proper" to execute its other intentions in Title III. See . Rep. No. 1097, supra, at 96, reprinted in 1968 U.S. Code Cong. & Admin. News 2185 (asserting power found at Art. 11, Sec. 8, cl. 18). As noted above, these other intentions include judicial integrity, which, as also noted earlier, was dispositive in the Supreme Court's decision in Lee to uphold the predecessor statute to section 2515. In short, Congress agrees with the Supreme Court that a bright-line rule of exclusion is best suited to protect the federal interests at stake. Such bright-line rules are always best addressed in the

political arena rather than in the courts, since they evolve against the background of law developed on an ad hoc basis by the courts. See Professor Herbert Wechsler's seminal work on this subject, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 545 (1954).

Where, as here, the State concedes Congress's power (absent consideration of the Tenth Amendment) to enact such a law, the Tenth Amendment does not impose an independent limitation on Congress that permits a court to reject Congress's view that a narrow aspect of a statute is "necessary" to effectively implement its larger purposes.[6] As stated by Justice

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[6]Professor Van Alstyne has noted the Supreme Court's general refusal to substitute its view of what is "necessary" for that of Congress when federalism

concerns are involved. "Usually, ... even in close cases when the federalism claim has failed (as most often it has indeed failed), it has failed because the Court has yielded to an assertion of some overriding federal interest it deemed adequate to rationalize the exceptional intrusiveness of the challenged act." The Second Death of Federalism, supra, 83 Mich. L. Rev. at 1722 & n.61.

See Fry v. United States, 421 U.S. 542 U.S. 542, 548 (1975) (upholding application of federal wage restraints as a national emergency measure): Testa v Katt, 330 U.S. 386 (1947) (upholding binding nature of penal provisions of Emergency Price Control Act on state courts under supremacy clause); Case v Bowles, 327 U.S. 92 (1946) (upholding) application of the Emergency Price Control Act against Tenth Amendment challenge).

While not explicitly considering the Tenth Amendment issue, the Court has several times struck state judicial procedural rules in order to further a federal legislative goal or protect a federal statutory right. See International Longshoreman's Ass'n, AFL-CIO v Davis, 106 S. Ct. 1904 (1986)(striking state pleading rule to protect preemption of National Labor Relations Act); Dice v Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952) (striking state procedural rule to protect right of recovery under Federal Employers' Liability Act); Brown v Wesern Ry. of Alabama, 338 U.S. 294 (1949) (same); see also Chapman v California, 386 U.S. 18 (1967) (imposing federal interpretation of "harmless error rule" over that of state).

Story: "It is plain, therefore, that it could not have been the intention of the framers of this (Tenth) amendment to give it effect, as an abridgement of any of the powers granted under the constitution, whether they are express or implied, direct or incidental." 3 Commentaries on the Constitution Sec. 11901 (1833), in V The Founders' Constitution 406 (P. Kurland & R. Lerner ed. 1987).

There is nothing peculiar about Congress's intrusion under the Commerce Clause into state criminal proceedings that compels a different conclusion. Admittedly, there is little discussion by the Founding Fathers of the meaning of the Tenth Amendment as it relates to criminal laws and their administration. This is to be expected, since it was presumed that all powers in such matters

not given to the United States would continue, unenumerated, within the states as before. However, there is a pertinent reference by President James Monroe on this subject: "(T)he administration of justice, and the whole criminal code, except in cases of breaches of the laws of the United States made under and in conformity with the powers vested in Congress ... are regulated by State laws." The Founders' Constitution, supra, at 405 reprinting in part Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822) (emphasis added). This statement evidences that one of the few Founding Fathers[7] who may have said anything on

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[7]While some may disagree with the characterization of Monroe as a "founding Father," he participated substantially in the formation of the Republic, including the debates about the principle of federalism, and was familiar with the thinking of the greater men who over-

the subject did not consider the Tenth Amendment to establish any special limitation on Congress simply because it may choose to exercise its vested power in the criminal arena.

Currently, constitutional doctrine regarding the Tenth Amendment has reverted to its pre-Usery state, to wit, the Tenth Amendment is no more than a truism; it tautologically states that powers not given to the federal government are reserved to the states. The Court recognizes the avowed intent of Chief Justice Rehnquist in his Garcia dissent to resurrect Usery, 469 U.S. at 580. Perhaps a majority of the Supreme

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shadowed him during that era. Monroe studied law under Thomas Jefferson beginning in 1780. From 1783 to 1786 he served in the Congress under the Articles of Confederation. He was chosen a member of the Virginia House of Delegates in 1787 and, in 1788, a member of the state convention at which Virginia ratified the new federal Constitution.

Court will do so as its composition changes and shifts in its politics and philosophy of constitutional adjudication.

As noted by Professor Herbert Wechsler, "Federalism would have few adherents were it not, like other elements of government, a means and not an end." The Political Safeguards of Federalism, supra, at 552. A return to Usery would likely be considered to "politicize" the Constitution, which the defenddant has cautioned against elsewhere.[8] The long-standing view, however, has been that the Tenth Amendment will not support political goals:

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[8]See Remarks of the Attorney General at the American Studies Center Bicentennial Program in Washington, D.C. (June 12, 1987). The printed version of the Attorney General's address states, at 2: "Too often the Constitution has been, in a word, politicized. The modern-day politicization of our supreme law has been encouraged primarily by political and

> The attempts, then, which have been made from time to time, to force upon this language (the Tenth Amendment) an abridging, or restrictive influence, are utterly unfounded in any just rules of interpreting the words, or the sense of the instrument. Stripped of the ingenious disguises, in which they are clothed, they are neither more nor less, than attempts to foist into

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judicial liberals..." Commentators have noted, however, that Usery was a conservative political doctrine. A leading treatise on constitutional law describes the rise of Usery as follows: "There is little or no explanation for the shift in the Court's position regarding the judically enforceable nature of the tenth amendment other than the politcal background and philosophy of the newly appointed justices. The decisions of the 1970's, attacking the established principle of judicial deference to congressional decisions regarding federalism issues were joined only by Republican justices. Those justices were Blackmun, Powell, Rehnquist, Stewart (who was replaced by the even more states' rights oriented Justice O'Connor) and Chief Justice Burger." J. Nowak, R. Rotunda & J. Young, Constitutional Law 162 n.33 (3d ed. 1986). Ultimately, the doctrinal "glue" holding together the Usery approach proved so weak that it could not hold even a majority of a conservative Court, as reflected in the change of mind by Justice Blackmun, who concurred in Usery but wrote the opinion of the Court in Garcia only nine years later.

> the text the word "expressly;" to qualify, what is general, and obscure, what is clear, and defined. They make the sense of the passage bend to the wishes and prejudices of the interpreter; and employ criticism to support a theory, and not to guide it. ... (Constitutions) are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders.

Story, Commentaries, supra, Section 1901, in V The Founders' Constitution, supra, at 407.

III.

Even if the Garcia dictum on which the State relies makes the Tenth Amendment fertile soil for planting the seeds of a states' rights movement, it would ill behoove a federal district judge to say so by declaring unconstitutional an act of Congress in so important an area as here. Much has been said of late regarding the evils of activist judges who strain to overrule legislation enacted by the elected representatives of the people. If those elected to serve in

Washington should desire to constrain the actions of their governments back home, far be it from this Court to tell them that they cannot do so. See Garcia, 469 U.S. at 556. See generally The Political Safeguards of Federalism, supra.

If the Constitution forbids the Act, it is for someone else to say.

SO ORDERED.

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AVERN COHN

United States District Judge

Dated: August 10, 1987

Detroit, Michigan

A TRUE COPY

BY_____

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APPENDIX B

JULY 6, 1988

NO. 87-1719

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EDWIN MEESE, Attorney General for the United States,

Defendant-Appellee,

and

STEVE ASMAR & METRO INSTITUTIONAL FOOD SERVICES, INC.,

Intervening Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

BEFORE: JONES and RYAN, Circuit Judges; and Gibson, District Judge.*

PER CURIAM. The State of Michigan, brought this declaratory judgment action

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*The Honorable Benjamin F. Gibson, United States District Judge for the Western District of Michigan, sitting by designation.

asking the district court to find that 18 U.S.C. Sec. 2515, which excludes from evidence in all state criminal and civil trials, conversations which were recorded in violation of the federal wiretapping statutes, is beyond the scope of Congress' Commerce Clause power and therefore violative of the tenth amendment. The district court dismissed plaintiff's action. We affirm.

A Wayne County, Michigan grand jury issued subpoenas based on privately tape recorded telephone conversations anonymously given to state prosecutors. A Michigan state court quashed the subpoenas, holding that the evidence was obtained in violation of Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968, 18 U.S.C. Sec. 2515. The state court's action ended the grand jury investigation.

On March 10, 1987, the State of Michigan filed suit in federal district court against the Attorney General of the United States, seeking a declaratory judgment that 18 U.S.C. Sec. 2515 was violative of the tenth amendment. Section 2515 states:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. Section 2515.

The State of Michigan argued that Section 2515 required the suppression of evidence where the state was not a party because of Section 2511 which states in pertinent part:

> (1) Except as otherwise specifically provided in this chapter any person who-

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when-

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

...

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

> shall be punished as provided in subsection(4) or shall be subject to suit as proovided in subsection(5).

18 U.S.C. Section 2511. Plaintiff argued that requiring suppression of the evidence was beyond the Congress' Commerce Clause power, under which the Crime Control Act was passed.

The district court issued a show cause order as to ripeness. The parties agreed there was a case or controversy within article III of the Constitution. Thereafter, on cross-motions for summary judgment, the district court found that the exclusionary rule found in 18 U.S.C. Section 2515 was constitutional as an exercise of Congress' Commerce Clause power.

Although both parties agreed below that this case was ripe for adjudication, the United States Attorney General now argues that there is no "case or controversy" pursuant to article III of

the Constitution and, therefore, this court lacks subject matter jurisdiction. The judicial power of the federal government is limited to that provided for by article III.

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies." Liverpool S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885). The requirements of Art III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. The judicial power of the United States defined by Art III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination or real, earnest and vital controversy." Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892).

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982). If there is no case or controversy, this court lacks subject matter jurisdiction to hear this appeal even though the parties agreed below that the case was right for adjudication; agreement of the parties cannot establish subject matter jurisdiction. In re Rini, 782 F.2d 603, 609 n.10 (6th Cir. 1986).

The Supreme Court, discussing the limits of article III power, has stated:

> (A)t an irreducible minimum, Art III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976).

Valley Forge Christian College, 454 U.S. at 472. Thus, the plaintiff, in the instant case, must show that (1) it has suffered actual or threatened injury, which it clearly has through the quashing of the subpoenas, and (2) the injury was the result of an act of the defendant. "The court may not act to redress injury 'that results from the independent action of some third party not before the court.'" Toth v. United Auto. Aero. & Agr. Implement Workers, 743 F.2d 398, 404 (6th Cir. 1984) (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42 (1976)). It is the second element which the plaintiff fails to satisfy.

Plaintiff's injury did not result from any action taken by the defendant, the Attorney General of the United States. Rather, it was the state trial court

judge who quashed the subpoenas and enforced the federal statute, 18 U.S.C. Section 2515. The Attorney General has not threatened plaintiff with any penalty for attempting to use the taped conversations which are the subject of this litigation. Plaintiff's remedy is to appeal the state court's decision through the state court system.

Because defendant herein has not caused the injury suffered by the plaintiff, this court is without subject matter jurisdiction to hear this appeal. Although the district court dismissed the instant action on the merits, this court may affirm the district court for reasons other than those stated by the lower court. Russ' Kwik Car Wash v. Marathon Petroleum Co., 772 F.2d 214, 216 (6th Cir. 1985).

For the reasons stated above the decision of the district court is AFFIRMED.